No. 28.

IN THE

United States Circuit Court of Appeals.

NINTH CIRCUIT.

WM. H. LAKIN, Plaintiff in Error,

VS.

J. H. ROBERTS et al., Defendants in Error.

PETITION FOR REHEARING.

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WM. H. LAKIN,

Plaintiff in Error,

vs.

J. H. ROBERTS ET AL.,

Defendants in Error.

PETITION FOR REHEARING.

The plaintiff in error respectfully petitions the said Circuit Court of Appeals to grant a rehearing of the above entitled cause, and in support of his petition respectfully urges upon the attention of the Court the following considerations:

Question of Statutory Construction.

The case, as decided by the Court, is made to hinge upon the construction of the revised statutes of the United States, upon the single question whether the *width* of lode claims located prior to the passage of the Act of May 10th, 1872, is absolutely limited by the terms of section 2320, declaring that "no claim shall extend more than three hundred feet on each side of the vein at the surface;" so that, notwithstanding a location of surface of greater width for working purposes on the working side of a vein, made prior to the Act of May 10th, 1872, was covered and protected by the terms of the original Mining Act of July 26th, 1866, and notwithstanding an application for a patent for such claim

was pending in the Land Office, upon a preliminary survey and diagram of the claim in accordance with sections 1, 2, 3 and 4 of the Act of 1866, and notwithstanding the time for adverse claim under the application had expired prior to the passage of the Act of 1872, yet no entry could be made or patent issued under such pending application after the passage of said Act, for any greater quantity of surface on either side of the lode line than three hundred feet.

It appears from the record in this case that the application for the patent the validity of which is in controversy, was for a quartz lode extending along a mountain side; that the surface lines of the location extended fifty feet up the mountain above the line of the lode, but were so extended laterally down the side of the mountain as to include the surface between the lode and Jamison creek about one thousand feet distant, for working purposes, in order to include all tunnels run or to be run into the side of the mountain, a tramway and road leading from the tunnel to the creek, a millsite located along the creek and certain timber and the water of the creek for working purposes—all of which were needed for the convenient working of the ledge. It was represented to the Land Office, in the application for the patent for the claim, that the applicants had previously occupied the land applied for and improved the same according to the local customs and rules of miners in the district where the same was situated, and had expended in actual labor and improvement thereon an amount not less than one thousand dollars, and that there was no controversy as to the claim to their knowledge, and that

they therewith presented a diagram of said mining claim so extended as to conform to the rules of said mining district. (Record, folio 53.) The records of the Land Office establish that the requisite notice required by the Sec. 3, of the Act of 1866, was thereupon given for the period of ninety days, and that no adverse claim was filed in the Land Office at any time. (Record, folio 53–4.) They also show that a preliminary survey of the claim had been made by the Deputy Surveyor-General, in conformity to which the diagram had been filed and posted on the claim and in the Land Office. (Record, folio 51.) They also show that after the passing of the Act of May 10th, 1872, to wit, in 1877, the Surveyor-General approved and filed the preliminary survey of the claim made by his deputy (Record, folio 51, 54); that an entry was made by the successors of the applicants in pursuance of the original application (Record, folio 56–7), and a patent was thereupon issued to them. The patent purports to be issued pursuant to the revised statutes of the United States, but the descriptive references therein contained taken in connection with the entry and survey fully identify the claim granted with the claim applied for by the original applicants, and entered by their successors in interest. The receiver's receipt showing the entry for the patent expressly identifies the land entered and paid for with the land applied for by the original applicants under the Act of July 26th, 1866. (Record, folio 56–57.)

The question, therefore, is whether the second section of the Act of 1872, incorporated in Sec. 2320 of the revised statutes by the provision therein contained that " no claim

shall extend more than three hundred feet on each side of the middle of the vein at the surface," operated retroactively so as *ipso facto* to destroy the validity of the Mammoth Claim as to any excess of three hundred feet in width between the lode and Jamison creek, and utterly to deprive the Land Department of jurisdiction to receive an entry or issue a patent therefor, although the claim had been previously covered and protected to its full extent by the express terms of the Act of 1866.

There are three sets of considerations, either one of which seems to me conclusive against the construction adopted by the Court; the cumulative effect of which, in my judgment, demonstrates that the Court has mistaken the true construction and operation of the statute.

The words cited from the statute are prospective only, and relate to claims located after May 10, 1872, *and not to any claim previously located*, MUCH LESS TO ANY CLAIM FOR WHICH A RIGHT TO MAKE AN ENTRY FOR A PATENT HAD PREVIOUSLY CRYSTALLIZED UNDER A PENDING APPLICATION, MADE PRIOR TO MAY 10, 1872.

I. Act of 1872 Prospective by its Terms.

Sec. 2320 of the revised statutes, considered by itself, without reference to other statutory provisions or inquiry as to the principles by which its construction is to be determined, is ambiguous in its phraseology. The words: "*No claim* shall extend more than three hundred feet in width on each side of the middle of the vein at the surface," may possibly be construed *all comprehensively and retroactively* so as to operate upon previously located claims, as well as upon those located after the passage of

the Act of May 10, 1872. On the other hand, they may be construed prospectively as applying only to claims located after the passage of that Act.

If they be construed retrospectively, we must supply by implication from the whole of the previous context, after the words "no claim" the words "heretofore or hereafter located." If, on the other hand, we construe the words prospectively only, we have only to supply by implication from the immediately preceding context the words "located after the tenth day of May, 1872."

Construing the last three sentences of Sec. 2320 together, as they may be construed without violence, they regulate the *length, discovery, width, and parallelism of end lines of all claims located after the passage of the Act of May* 10, 1872, and neither of them has any retroactive operation upon claims theretofore located.

The provision in regard to the parallelism of end lines of "*each claim*" in the last sentence of the section, is just as broad and comprehensive in its phraseology as that in regard to the width of claims. But the Supreme Court has expressly recognized the prospective operation of that provision. It has said:

"Under the Act of 1866, parallelism in the end lines of a surface location was not required; but, *when a location has been made since the Act of* 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines."

Iron Silver Mining Co. vs. *Elgin M. and S. Co.*,
118 U. S., 196–209.

It may well be asked, if the last sentence of section 2320 of the revised statutes is prospective in its operation, why should not the next to the last sentence be likewise prospective only.

It is undeniable that if the last two sentences of Sec. 2320 had been connected directly with the second sentence of the section, by means of semicolons and the use of the conjunction "and," instead of being separated therefrom by periods, there could be no room to doubt the intention of Congress to give each of them only a prospective operation. The last three sentences of the section would then read together as follows:

"A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limit of the claim located; and no claim shall extend more than three hundred feet in width on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, 1872, render such limitation necessary; and the end lines of each claim shall be parallel to each other."

Punctuation may be disregarded in the construction of a statute, or the Court may repunctuate if need be, to render the true meaning of the statute.

Hammock vs. *Farmers Loan and Trust Co.*, 105 U. S., 77.

United States vs. *Lacher*, 134 U. S., 624.
Martin vs. *Gleeson*, 139 Mass., 183.
Cushing vs. *Worrick*, 9 Gray., 382.

The phraseology of statutes may be changed by the interpolation or elimination of words, in order to reach the intent of the enactment, or to prevent some inconvenience, absurdity, hardship or injustice presumably not intended.

Endlich on Int. of Statutes, Sec. 295 *et seq.*

But, as already suggested, there is no necessity for actually changing the punctuation, or phraseology, or collocation of sentences in Sec. 2320, in order to prevent the hardship and injustice attending a retroactive construction. The last previous subject-matter of enactment preceding the last two sentences of Sec. 2320, relates expressly to claims "*located after the tenth day of May*, 1872." If now we apply the comprehensive terms used in the succeeding sentences to all claims of the same character as those last before mentioned, and supply in brackets the matter of appropriate reference implied, the last two sentences would be understood as follows:

"No claim [located after the 10th day of May, 1872] shall extend more than three hundred feet on each side of the middle of the vein at the surface," etc. "The end lines of each claim [located after the 10th day of May, 1872] shall be parallel to each other."

The objection that under this interpretation the statute would appear *defective*, in merely providing for the *length* of claims located prior to May 10th, 1872, and not providing for their *width*, is fully met and answered by a

proper consideration of section 2322 of the revised statutes. This section corresponds with section 3 of the Act of 1872, which immediately follows the section of that Act embodied in section 2320, without the interpolation of the section embodied in section 2321, which is taken from section 7 of the Act of 1872. Section 2322, corresponding to section 3 of the Act of 1872, provides as follows:

"That *the locators of all mining locations heretofore made*, or which shall hereafter be made, on any mineral vein or ledge situated on the public domain, *their heirs and assigns, where no adverse claim exists on the 10th day of May*, 1872, so long as they comply with the laws of the United States, and with State, Territorial and local regulations not in conflict with the laws of the United States governing their possessory title, *shall have the exclusive right of possession and enjoyment* OF ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS," etc.

The fact that this section also applies as well to the rights of locators of all mining locations "which shall hereafter be made," and that the right of possession and enjoyment is qualified generally by the terms "*so long as they comply* with the laws of the United States," etc., affords no reply to the proposition that the locators of previous locations are expressly protected to the full extent of "ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS."

The condition that all locators shall "*comply* with the laws of the United States," can only refer to such acts of compliance as are affirmatively required by those laws.

The conditions of annual labor, and of the mode and terms of future applications for patents, or the presentation of adverse claims during the period limited therefor, must be complied with by all to whom those conditions apply. So likewise, all persons who undertake to locate claims after the passage of the Act of 1872, must comply with the requirements of that statute as to the manner and extent of the location. But the condition of *complying* with the Act of 1872, so far as regards the *location* of claims, manifestly does not and cannot apply to mining locations made before the passage of that Act. If a prior location had been made which was protected by the Act of 1866, the Act of 1872 no where requires the locator to *re-locate* it, or if it had been surveyed and diagrammed upon application for a patent under the former Act, no where requires him to *resurvey* his claim, or to *make, or file in the Land Office, any new diagram* thereof. He has therefore *nothing to comply with* on his part, *as respects the lines of his location.* But so long as he *complies* with the laws of the United States, and other laws *governing his possessory title* in so far as they require *acts of compliance* on his part, he is expressly protected, as are "the locators of all mining locations heretofore made," in the "EXCLUSIVE RIGHT OF POSSESSION AND ENJOYMENT OF ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS."

No good reason appears why the *length* of lode claims located prior to May 10, 1872, should be determined by the laws in force at the date of the location, to the exclusion of the *width* of surface lawfully occupied by the locators for working purposes. The *lode* is certainly *the*

principal thing of value: and if an association of persons can claim 3,000 feet along a lode, instead of merely 1,500 feet, because the location was made prior to the Act of 1872, there seems to be no good reason why they should not be allowed the *incidental privilege* of "*a reasonable quantity of surface for the convenient working of the same,* as fixed by local rules," although the surface may on the only working side of the lode exceed three hundred feet in width. The bare and unproductive surface down a mountain side is presumably of far less value than the lode, and it seems unreasonable to construe the statute as *making more of the incident* than it does of *the principal thing.*

But no room is left for doubt as to the wholly prospective nature of the provision of the Act of 1872 limiting claims to three hundred feet in width on each side of the vein, when the express terms of that Act are considered. The Act of 1872 CONTAINS THE MOST FORMAL AND EXPRESS RESERVATION OF ALL EXISTING RIGHTS ACQUIRED UNDER THE ACT OF 1866.

Sec. 9 of the Act of 1872, reads as follows:

"SEC. 9. That sections one, two, three, four and six of 'An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, BUT SUCH REPEAL SHALL NOT AFFECT EXISTING RIGHTS. APPLICATIONS FOR PATENTS NOW PENDING MAY BE PROSECUTED TO A FINAL DECISION IN THE GENERAL LAND OFFICE; but in such cases, where adverse rights are not affected there-

by, patents may issue in pursuance of the provisions of this Act; and all patents for mining claims heretofore issued under the Act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this Act, where no adverse rights exist at the time of the passage of this Act."

The foregoing section expressly declares the intent of Congress to preserve unabridged and unaffected all of the "EXISTING RIGHTS" held by mining claimants under the Act of 1866. Instead of designing to abridge them in the least, they are expressly enlarged as are the rights of all prior patentees who received their patents under the law of 1866, by the grant of all lodes which may be discovered to have their apices within the boundaries of their claims. This is manifestly all that is intended by declaring that patents under pending applications "may issue in pursuance of the provisions of this Act," the only exception being where at the time of its passage there was an adverse claim to some other ledge extending within the lines of the surface applied for. A patent issued under the Act of 1866 alone, without this grant, would merely carry the lode applied for, with the right to use the surface granted for working purposes only, subject to the rights of any other locator to locate any other subsequently discovered ledge which might be found to cross the patented surface. By the grant of the additional privilege of any other ledges which may be discovered within the surface applied for by means of a patent issued under the Act of 1872, no limitation of any existing right as to the extent of surface properly enjoyed for working purposes under the provisions of the Act of

1866, can be at all inferred, in face of the express reservation of "*existing rights*" from the effect of the repeal of that Act. Nor is there any more ground to assume such limitation, because of the additional grant of privileges under the Act of 1872, to an applicant for a patent under the Act of 1866 than there is to assume a limitation upon prior patentees under that Act whose rights are expressly enlarged by grant in the same connection, without in any manner limiting the existing rights previously granted.

It is further to be observed that in Sec. 12, of the Act of 1872, are found the following additional words expressly preservative of rights previously acquired under the Act of 1866.

"Nothing in this Act shall be construed to enlarge or effect the rights of either party in regard to any property in controversy at the time of the passage of this Act or of the Act entitled 'An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July twenty-sixth, eighteen hundred and sixty-six, NOR SHALL THIS ACT AFFECT ANY RIGHT ACQUIRED UNDER SAID ACT."

But, *as if to clinch, by a third nail*, BEYOND THE POSSIBILITY OF CONTROVERSY, THE PROPOSITION THAT THE ACT OF 1872, WAS INTENDED BY ITS TERMS TO BE PROSPECTIVE ONLY, AND NOT TO IMPAIR ANY EXISTING RIGHT WHATEVER, we find in Sec. 16, of that Act, the following UNEQUIVOCAL LANGUAGE:

"SEC. 16. That all Acts and parts of Acts inconsistent herewith are hereby repealed; PROVIDED, THAT

NOTHING CONTAINED IN THIS ACT SHALL BE CONSTRUED TO IMPAIR, IN ANY WAY, RIGHTS ACQUIRED UNDER EXISTING LAWS."

The effect of this proviso, taken in connection with the express reservation of "*existing rights*" under the Act of 1866, made in section 9, and of "*any rights acquired under said Act*," in section 12, was undoubtedly to continue in existence by the very terms of the Act of 1872, every right acquired previous to its passage and existing at its date which was covered and protected by the Act of 1866, and *absolutely to forbid any retrospective construction or operation of the Act of* 1872, *so as to impair those rights* "IN ANY WAY."

The proviso contained in Sec. 16, of the Act of 1872, is embodied in the same terms in section 2344 of the revised statutes.

All of the rights preserved by the Act of 1872, are further expressly preserved and protected by section 5597, of the revised statutes, which is declarative of the uniform policy of Congress to preserve all rights, and not to impair them by any retrospective operation or construction whatever.

That section reads as follows:

"SEC. 5597. The REPEAL of the several Acts embraced in said revision SHALL NOT AFFECT ANY ACT DONE, OR ANY RIGHT ACCRUING OR ACCRUED, OR ANY SUIT OR PROCEEDING HAD or commenced in any civil cause BEFORE THE SAID REPEAL, BUT ALL RIGHTS and liabilities under said Acts SHALL CONTINUE, AND MAY BE ENFORCED IN THE SAME MANNER,

AS IF SAID REPEAL HAD NOT BEEN MADE," etc.

The Court is thus not only warranted, but expressly required to look to the terms of the repealed Act of 1872, to find out what rights existed under it, or were continued in existence by it; for all existing rights were regarded by Congress as *sacred*, and as enforceable under the terms of laws existing at the date of the revision in like manner, as if there had been no repeal of those laws. It is further to be considered that by the use of the words "*former laws*," in section 2328 of the revised statute, which declares that "*applications for mining claims* UNDER FORMER LAWS *now pending may be prosecuted to a final decision in the General Land Office*," etc., Congress expressly intended to refer to applications pending *under the original quartz mining law of* 1866, and *under the original placer mining law of* 1870, applications under both of which laws were expressly protected from all invasion or retrospective impairment "IN ANY WAY," by the express terms of the Act of 1872.

The Supreme Court has repeatedly recognized the justice and propriety of consulting the terms of the statutes embodied in the revision as an aid to their construction, and even in cases of their undoubted prospective operation, where there is any ambiguity in the revision.

U. S. vs. *Lacher*, 134 U. S., 624.
U. S. vs. *Bowen*, 100 U. S., 508, 513.
U. S. vs. *Hirsch*, 100 U. S., 33.
Myer vs. *Western Car Co.*, 102 U. S., 111.
U. S. vs. *Le Bris*, 121 U. S., 278.

A fortiori, must the original statutes be consulted in

order to ascertain what rights held under them were *intended to be preserved from any retrospective impairment* by the revision, *according to its express terms* to that effect.

II. Retrospective Construction Inadmissible.

To sustain a retrospective construction of the statute in question, to the impairment of a right previously covered and protected by the law, it must appear, not only that such construction is not forbidden by the terms of the statute itself, but also that the right is not in the nature of a grant, or vested right of property, and that the intent to divest, impair or destroy it in any particular, is so clearly and unambiguously expressed beyond a reasonable doubt, that any merely prospective interpretation of the statute would be wholly inadmissible and unreasonable, and contrary to its express and unequivocal terms.

A. *Nature of Mining Claims—Rights of Property Vested by Grant.*

It has been repeatedly held that a mere personal and unassignable privilege of pre-emption of public land is not such a vested right that Congress has not the power, if it chooses unequivocally to exercise it, to withdraw the privilege before payment is made under it, and to dispose of the land in some other manner. But a careful consideration of the decisions of the Supreme Court of the United States as to the nature of mining claims, and the effect thereupon of the mining Acts of Congress, will disclose that the rights of mining claimants under these laws, are far more than a mere pre-emption privilege, and that prior to payment or patent they are in the nature of *rights of property vested by conditional*

grant from Congress bestowing a right of exclusive possession and enjoyment, which cannot be divested against the consent of the grantee, so long as the conditions are complied with, without imparing the obligation of a contract between the government and the owner of the claim.

It is well settled that rights vested under a statutory grant can not be divested at the mere will of the law making power.

Fletcher vs. *Peck*, 6 Cranch., 87.
Ferrett vs. *Taylor*, 9 Cranch., 43.
Town of Pawlett vs. *Clark*, 9 Cranch., 292.
Grogan vs. *San Francisco*, 18 Cal., 591.
Benson vs. *Mayor*, 10 Barb., 223.

An accepted conditional grant made by law is a binding contract, the obligation of which cannot be impaired by the government, while the conditions are complied with by the grantee.

McGechee vs. *Mathis*, 4 Wall., 143.
Davis vs. *Gray*, 16 Wall., 203.

In the light of these principles we call attention to the following citations of authority from which we quote, to show that mining rights protected by the mining law of Congress, are in the nature of *vested rights of property.*

"The Government, by its silent acquiescence, assented to the general occupation of the public lands for mining. * * * He who first connects his own labor with property thus situated, and open to general exploration, does, in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So

the miners on the public lands throughout the Pacific States and Territories, by their custom, usage and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized and enforced by the Courts of those States and Territories. * * * 'So fully recognized have become these rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various Acts of the Legislature in the same manner as if they were *rights which had been vested* by the most distinct expression of the will of the law makers.' This doctrine of *right by prior appropriation* was recognized by the legislation of Congress in 1866. The Act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its 9th section, declares, 'that, whenever by priority of possession right to the use of water for mining, agricultural, manufacturing or other purposes, have *vested and accrued*, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such VESTED RIGHTS shall be maintained and protected in the same.' "

Atchinson vs. *Peterson*, 20 Wall., 507.

"Such rights as the mining laws allow and as Congress concedes, to develop and work the mines, is *property in the miner*, and property of great value. * * * Those claims are the *subject of bargain and sale.* * * * They are PROPERTY IN THE FULLEST SENSE OF THE WORD, and *their ownership, transfer and use* are governed by a well de-

fined code or codes of law, and *are recognized by the* States and *Federal Government.*"

Forbes vs. *Gracey*, 94 U. S., 762, 767.

"It is the established doctrine of this Court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches, etc., * * * are RIGHTS WHICH THE GOVERNMENT HAD BY ITS CONDUCT RECOGNIZED AND ENCOURAGED, AND WAS BOUND TO PROTECT, BEFORE THE PASSAGE OF THE ACT OF 1866."

Broder vs. *Natoma M. and M. Co.*, 101 U. S., 274.

"A mining claim perfected under the law is *property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent.* There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the *title acquired* to such a claim *by a valid location*, than it is for any other *grant from the United States.* The language of the Act is that the locators '*shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations*,' which is to continue until there shall be a failure to do the required amount of work within the prescribed time. * * * A location, to be effectual, must be good at the time it is made. When perfected, *it has the effect of a grant by the United States of the rights of present and exclusive possession.*"

Belk vs. *Meagher*, 104 U. S., 279.

"Every interest in lands is the subject of sale and

transfer, unless prohibited by statute, and no words allowing it are necessary. *In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim.* * * * He can hold as many locations as he can purchase, and rely upon his possessory title. He is *protected thereunder as completely as if he held a patent* for them, subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the government a fee of $5 an acre, a sum that would not be increased if a separate patent were issued for each location."

St. Louis Smelting Co. vs. *Kemp*, 104 U. S., 636.

"Though by appropriate proceedings and the payment of a very small sum, a legal title in the form of a patent may be obtained for such mines, the *possession under a claim established according to law is fully recognized by the Acts of Congress, and the patent adds little to the security of the party in continuous possession of a mine he has discovered or bought.*"

Chambers vs. *Harrington*, 111 U. S., 350.

Mining locations, "when perfected under the law, ARE THE PROPERTY OF THE LOCATOR, OR THEIR ASSIGNS, AND ARE NOT, THEREFORE, SUBJECT TO THE DISPOSAL OF THE GOVERNMENT." It appearing that the locators had "done all that was necessary under the law" to complete a valid location, "*they had then done all that was necessary under the law for the* ACQUISITION OF AN EXCLUSIVE RIGHT TO THE POSSESSION AND ENJOYMENT OF THE GROUND. The claim was thenceforth THEIR PROPERTY. They

needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. UNTIL THE PATENT ISSUED, THE GOVERNMENT HELD THE TITLE IN TRUST FOR THE LOCATORS OR THEIR VENDEES. THE GROUND ITSELF WAS NOT AFTERWARDS OPEN TO SALE."

Noyes vs. *Mantle*, 127 U. S., 348.

Where an application for a patent has been made and the time for adverse claim is past, no third person can be heard, but *the applicant is* " THE EQUITABLE OWNER OF THE MINING GROUND, AND THE GOVERNMENT HOLDS THE PREMISES IN TRUST FOR HIM, TO BE DELIVERED UPON THE PAYMENTS SPECIFIED."

Dahl vs: *Raunheim*, 132 U. S., 260.

Dahl vs. *Montana Copper Co.*, 132 U. S., 264.

" *The location itself has the effect of a* GRANT, or as Justice Knowles said in *Robertson* vs. *Smith*, 1 Mont., 416, 'it is a TITLE GIVEN BY AN ACT OF CONGRESS, and hence EQUIVALENT TO A PATENT FROM THE UNITED STATES.' THE PATENT IS SIMPLY THE EVIDENCE OF THIS PRECEDENT GRANT, and must necessarily relate back to it."

Talbott vs. *King*, 9 Pac. Rep., 441; 6 Mont., 76.

" A valid location of a quartz lode mining claim is a GRANT FROM THE GOVERNMENT TO THE LOCATOR *thereof, and carries with it the right*, by a compliance with the law, *of obtaining a full and complete title to all the lands included within the boundaries of the claim*, which by the

location are withdrawn from sale and pre-emption, and *the patent when issued* relates back to the location, and *is not a distinct grant, but the consummation of the grant, which had its inception in the location of the claim.*"

Butte City Smoke House Lode Cases, 12 Pac. Rep., 859; 6 Mont., 397.

If the foregoing decisions are a correct enunciation of the law, it follows that each of the mining Acts of Congress created rights which were *vested by the grant of Congress*, and such VESTED RIGHTS could not be divested by the operation of any retrospective enactment,

B. *Retrospective Construction not Allowable, Prospective Construction Being Possible.*

But, further, regardless of the question whether an Act of Congress *could be effectual, to divest an existing right* to a mining claim which it had previously granted, and regardless of the fact that Congress *has expressly declared its intention to preserve all rights* which it had previously granted or protected, it is sufficient to forbid any retrospective construction of section 2320 of the revised statutes so as to divest an existing right of surface possessed for working purposes under the Act of 1866, that a prospective construction which will not impair or interfere with such right is possible, and is not expressly forbidden by the words of the statute.

In order that a prospective construction should be expressly forbidden by the language of the statute, we must insert after the words "*no claim*," the words "*whether heretofore or hereafter located.*" But there are no such words in the statute; and there is nothing expressly to

forbid a prospective construction. On the contrary, the impairment *in any way* of any right existing under the Act of 1866, is expressly forbidden by the terms of the Act of 1872. Yet, if such impairment were not expressly forbidden by the terms of the statute, it would be equally forbidden by the uniform rule that a possible prospective construction not contrary to the express language of the statute forbids a retrospective construction of the statute. This rule is by no means limited in its operation to cases where vested rights are of such a nature that they could not be impaired by retroactive legislation; but is equally effective to forbid the *impairment of any right previously covered by law, by a retrospective construction* of a new law, which does not in express terms purport to impair or take away such right, although there may be constitutional power to take it away.

Endlich, in his admirable work on the Interpretation of Statutes, lays down the rules applicable to this question of retrospective construction in the most explicit terms, enforcing them by very numerous citations of authority. He says (italics are ours):

"§ 271. **General Presumption Against Retroactive Operation.**— *Upon the presumption that the Legislature does not intend what is unjust* rests the leaning against giving certain statutes a retrospective operation. *Nova Constitutio futuris formam imponere debet, non praeteritis.* They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended. Indeed, *the rule to be derived from the comparison of a vast number of judicial utterances upon this subject*, seems to be, that,

even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is EXPRESSED BY CLEAR AND POSITIVE COMMAND, OR TO BE INFERRED BY NECESSARY, UNEQUIVOCAL AND UNAVOIDABLE IMPLICATION, FROM THE WORDS OF THE STATUTE, taken by themselves and in connection with the subject matter and the occasion of the enactment, ADMITTING OF NO REASONABLE DOUBT, BUT PRECLUDING ALL QUESTION AS TO SUCH INTENTION."

"§ 272. **Prospective Effect Apparently Contrary to Words.**—*Even where there is that in the statute which would seem upon other principles of interpretation, to require a retroactive construction,* THE PRESUMPTION AGAINST THE SAME, *in the absence of intention otherwise demonstrable to give the statute such an effect,* WILL OVERCOME THE INFLUENCE OF SUCH RULES."

"§ 273. **Acts Affecting Vested Rights.**—It is chiefly where the enactment would prejudicially affect vested rights, or *the legal character of past transactions*, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights, or creates a new obligation, or imposes a new duty, *or attaches a new disability in respect of transactions or considerations already past,* MUST BE PRESUMED, OUT OF RESPECT TO THE LEGISLATURE, TO BE INTENDED NOT TO HAVE A RETROSPECTIVE OPERATION. On the contrary, it was said in a recent case in England, *prima facie the general rule of construing acts of Parliament is, that they are prospective, and* RIGHTS ARE NOT TO BE INTERFERED WITH, UNLESS THERE ARE EXPRESS WORDS TO THAT EFFECT. *And this*

requisite of EXPRESS DECLARATION, POSITIVE EXPRESSION, AND THE LIKE, HAS BEEN REPEATEDLY INSISTED UPON IN DECISIONS IN THIS COUNTRY."

The Supreme Court of the United States has declared itself unequivocally in reference to these rules of construction:

"WORDS IN A STATUTE OUGHT NOT TO HAVE A RETROSPECTIVE OPERATION, UNLESS THEY ARE SO CLEAR, STRONG AND IMPERATIVE THAT NO OTHER MEANING CAN BE ANNEXED TO THEM, OR UNLESS THE INTENTION OF THE LEGISLATURE CANNOT BE OTHERWISE SATISFIED. THIS RULE OUGHT ESPECIALLY TO BE ADHERED TO, WHEN SUCH A CONSTRUCTION WILL ALTER THE PRE-EXISTING SITUATION OF THE PARTIES, OR INTERFERE WITH THEIR ANTECEDENT RIGHTS."

Per Paterson, J., in *U. S.* vs. *Heth*, 3 Cranch., 413.

"*A statute is never to be so construed as to have this* (viz., a retrospective) *effect, if it can be reasonably avoided.* THE PRESUMPTION UNTIL REBUTTED, IS THE OTHER WAY."

U. S. vs. *Moore*, 95 U. S., 760.

"IF IT BE CONCEDED THAT CONGRESS COULD DO THIS, THE PRINCIPLE IS TOO WELL ESTABLISHED TO NEED THE CITATION OF AUTHORITIES, THAT NO LAW WILL BE CONSTRUED TO ACT RETROSPECTIVELY, UNLESS ITS LANGUAGE IMPERATIVELY REQUIRES SUCH A CONSTRUCTION."

Auffmordt vs. *Raisin*, 112 U. S., 620.

"COURTS UNIFORMLY REFUSE TO GIVE TO STATUTES A RETROSPECTIVE OPERATION,

WHEREBY RIGHTS PREVIOUSLY VESTED ARE INJURIOUSLY AFFECTED, UNLESS COMPELLED TO DO SO BY LANGUAGE SO CLEAR AND POSITIVE AS TO LEAVE NO ROOM TO DOUBT THAT SUCH WAS THE INTENTION OF THE LEGISLATURE."

Chew Hong vs. *U. S.*, 112 U. S., 536.

"EVEN THOUGH THE WORDS OF A STATUTE ARE BROAD ENOUGH IN THEIR LITERAL EXTENT TO COMPREHEND EXISTING CASES, THEY MUST YET BE CONSTRUED AS APPLICABLE ONLY TO CASES THAT MAY HEREAFTER ARISE, UNLESS THE LANGUAGE EMPLOYED EXPRESSES A CONTRARY INTENTION IN UNEQUIVOCAL TERMS."

Twenty per cent. Cases, 20 Wall., 179.

"*As a general rule for the interpretation of statutes*, it may be laid down, that they NEVER SHOULD BE ALLOWED A RETROACTIVE OPERATION WHERE THIS IS NOT REQUIRED BY EXPRESS COMMAND OR BY NECESSARY AND UNAVOIDABLE IMPLICATION. WITHOUT SUCH COMMAND OR IMPLICATION THEY SPEAK AND OPERATE UPON THE FUTURE ONLY."

Murray vs. *Gibson*, 15 How., 421.

"IT IS OF THE VERY ESSENCE OF A NEW LAW THAT IT SHALL APPLY TO FUTURE CASES, AND SUCH MUST BE ITS CONSTRUCTION, UNLESS THE CONTRARY CLEARLY APPEARS."

McEwen vs. *Den*, 24 How., 242.

The rules thus laid down by Endlich, and approved by the Supreme Court of the United States, are everywhere recognized.

In *Dash* vs. *Van Kleek*, 7 Johns, 503, Chief Justice Kent says:

"A statute is not to be construed so as to work the destruction of a right previously attached. We are to presume *out of respect to the law-giver*, that the statute was not meant to operate retrospectively, and if we call to our attention the general sense of mankind, on the subject of retrospective laws, it will afford us the best reason to conclude that the legislature did not intend in this case to set so pernicious a precedent. * * * *It is a principle in the English common law, as ancient as the law itself, that* A STATUTE, EVEN OF ITS OWN OMNIPOTENT PARLIAMENT, IS NOT TO HAVE A RETROSPECTIVE EFFECT."

In *Sackett* vs. *Andros*, 5 Hill, 334, there is an able review of principles and authorities upon this important question. Brunson, J., says:

"*It is a general rule that a statute should not be construed so as to give it a retrospect beyond the time of its commencement* (2 Mis., 492; 1 Black, Conn., 45-6; Pac. Atk., Statute 6.) *This is not only the doctrine of the common law, but it is a* GENERAL PRINCIPLE OF GENERAL JURISPRUDENCE (Dunn on Stat., 680; *Dash* vs. *Van Kleek*, 7 Johns, 477, per Kent, C. J.) AND GENERAL WORDS IN A STATUTE SHALL BE RESTRICTED SO AS NOT TO DO A WRONG TO ANY ONE. * * * The case of *Gibson* vs. *Shute*, is reported in several books. (1 Freer, 466; 7 Jones, 108; 2 Ler., 227; 1 Show., 17; 2 Wood, 310; 1 Vent., 330.) There was first a parol promise made in

consideration of marriage. Then came the statute of 29 Car. 2, Ch. 3, declaring 'that NO *action shall be brought* whereby to charge any person upon ANY agreement in consideration of marriage,' unless the same shall be in *writing. Nothing could be more comprehensive than this language.* It included promises which had already been made, just as plainly as it did those which should be made in future, and yet in this action which was commenced after the passage of the Act, the plaintiff was allowed to recover upon the parol promise. Although the express words of the Act were strongly pressed upon the consideration of the Court by Serjeant Maynard, they held that past promises were not within the statute, 'for it would be very unreasonable to put such a construction upon the Act as should make it have a retrospect to invalidate and nullify contracts and agreements that were lawful at the time when they were made.' A case was mentioned by the Court which is directly to the present purpose. Another branch of the statute of frauds had provided that '*all* devises and bequests of any lands' shall be in writing and be attested by three or four credible witnesses, or else they shall be utterly void and of no effect.' And yet the Court said, it had been resolved that a will made before the statute was formed, though not so attested was good, although the testator did not die until after the statute was enacted, and that was truly said to be a stronger case than the one in hand, '*because the party might have altered his will, if he had pleased;* but an agreement he cannot, without the consent of the other party.' In *Ashburnham* vs. *Bradshaw* (2 Atk., 36) there was a devise to charitable uses; then came a *new statute* of

mortmain, declaring *all* such dispositions of property to be void, and afterwards the testator died. The case was referred for the opinion of the judges, who certified that the devise was good notwithstanding the statutes and Lord Hardwicke thereupon established the will, and directed the trusts to be carried into execution. A like decision was made upon the same statute in *Attorney-General* vs. *Andrews* (1 Ves. Sen., 225) and see *Wilkinson* vs. *Meyer* (2 Ld. Raym., 1350.) In *Couch* vs. *Jeffries* (4 Burr., 2460) the same rule of construction was applied to another statute. ALTHOUGH THE PLAINTIFF'S CASE WAS CLEARLY WITHIN THE WORDS OF THE ACT, HIS RIGHT WAS SAVED BY DENYING THE RETROSPECTIVE OPERATION OF THE LAW. Lord Mansfield said: 'Here is a *right vested*, and it is not to be imagined that the Legislature could *by general words* mean to take it away. They certainly meant *future* actions.' The same doctrine was fully maintained by this Court in *Dash* vs. *Van Kleek* (7 John., 477.) The question was whether a statute subsequently passed should take away a right of action previously vested in the plaintiff; and the Court held it should not, *although the case was plainly within the words of the law*. Thompson, J., said, 'it is repugnant to the first principles of justice, and the equal and permanent security of rights to take by law the property of one individual, without his consent, and give it to another. The principle contended for on the part of the defendant inevitably leads to and sanctions such a doctrine.' He added, 'IT CAN NEVER BE PRESUMED FROM THE GENERAL WORDS OF THIS STATUTE THAT THE LEGISLATURE INTENDED IT SHOULD WORK SUCH INJUSTICE.

NOTHING SHORT OF THE MOST DIRECT AND UNEQUIVOCAL EXPRESSIONS WOULD JUSTIFY SUCH A CONCLUSION.' He said further that the Act established a *new rule*, 'AND AS SUCH OUGHT NOT TO HAVE A RETROSPECTIVE OPERATION, UNLESS SO DECLARED IN THE MOST UNEQUIVOCAL MANNER, *which it certainly is not.*' These views were fully sustained in the opinion delivered by Chief Justice Kent, who proved that *the same doctrine prevails in the civil law.* INDEED, IT IS SO CONSONANT WITH THE PRINCIPLES OF NATURAL JUSTICE, THAT IT MUST BE FOUND EVERYWHERE, UNTIL WE GET BEYOND THE LIMITS OF CIVILIZATION."

III. Construction of Land Department to be Followed as a Rule of Property.

For more than twenty years the Land Department of the United States has construed the words in question here as prospective only, and a rule of property has grown up under its construction, which ought not at this late day to be disturbed.

On the 10th day of June, 1872, the Commissioner of the General Land Office issued its circular for the information of all the District Land Offices, and of mining claimants generally, embodying the text of the Act of May 10, 1872, and declaring:

"*Second.* By an examination of the several sections of the foregoing Act, it will be seen that *the status of lode claims located previous to the date thereof is not changed with regard to their extent along the lode* OR WIDTH OF SURFACE, such claims being restricted and governed both as to their *lateral* and *lineal* extent by the State, territo-

rial or local customs or regulations, which were in force at the date of such location, in so far as the same does not conflict with the limitations fixed by the mining statute of July 26, 1866.

"*Eighth.* Applications for patents for mining claims pending at the date of the Act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and when no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of said Acts.

"*Tenth.* With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Act provides that the lateral extent of location of veins or lodes *made after its passage*, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface," etc.

Copp's U. S. Mining Dec. (ed. 1874), pp. 270, 275, 277.

These instructions were clearly warranted by the express reservations made in the Act of 1872, for the absolute protection of all existing rights.

Every circular of instruction issued from the General Land Office since that date, whether under the Act of 1872, or under the revised statutes, has followed the same construction, and hundreds of patents have been issued since May 10, 1872, and since the adoption of the revised statutes, in pursuance of that construction. The patent in controversy is a practical proof of the construction placed upon the revised statutes by the Land Department.

The Chollar-Potosi Mine in Nevada, patented under

the Act of 1866, appears to have had a width of 1,081 feet, and a length of 1,400 feet.

Copp's U. S. Mining Laws (ed. of 1874), pp. 96–7.

Many other patents have been issued both before and since the Act of 1872, in pursuance of the Act of 1866, conveying an irregular surface of many acres, occupied in connection with a lode for working purposes throughout the Pacific States and Territories.

On Dec. 26, 1872, the Commissioner of the General Land Office wrote as follows in a decision addressed to the Register of the local land office at Central City, Colorado:

"On the 10th of May, 1872, Congress passed a new mining Act, and repealed said section two of the Act of 1866, expressly declaring, however, in the ninth section thereof, that "such repeal shall not affect existing rights," and again in the twelfth, "nor shall this Act affect any rights acquired under said Act" of July 26, 1866, and to impress this point more fully, the same idea is again repeated in the sixteenth section, where it declares that "nothing in this Act shall be construed to impair in any way rights or interests in mining property acquired under existing laws." *Where the application for patent was pending under the Act of July* 26, 1866, *on the* 10*th day of May,* 1872, NONE OF THE RIGHTS WHICH THE APPLICANT HAD ACQUIRED BY VIRTUE OF COMPLIANCE WITH SAID ACT OF 1866, WERE AFFECTED OR IMPAIRED IN ANY WAY. * * * AND ALL PATENTS ISSUED SINCE THE 10TH DAY OF MAY, 1872, UPON APPLICATIONS PENDING AT THAT TIME, EXPRESSLY CONVEY TO THE PATENTEE:

"*First.* THE SURFACE GROUND EMBRACED BY THE INTERIOR BOUNDARIES OF THE SURVEY," etc.

Copp's U. S. Mining Dec. (Ed. 1874), pp. 154–5.

In a communication to the Surveyor-General of Wyoming, Nov. 18, 1873, the Commissioner of the General Land Office wrote as follows:

"If the claim was located prior to May 10, 1872, the *size of the claim, both as regards the length and width*, is regulated by the local laws, customs and rules. If the claim was discovered since May 10, 1872, the size of the claim is limited by the Act bearing date the 10th May, 1872.

"Very respectfully, etc.,

"WILLIS DRUMMOND, Commissioner."

Id., p. 235.

On June 29, 1875, the Secretary of the Interior decided that "a *bona fide* application for a patent under the Act of 1866 is such *an appropriation of the premises embraced therein* as to take them out of the operation of the local laws" upon the question of an abandonment or forfeiture of the claim, and that consequently, under an application made Oct. 16, 1866, a patent might issue under an entry made in 1874, if there had been continuous possession of the claim, and no failure to comply with the provisions of the mining Act.

Sickles Mining Dec., p. 67.

Other decisions of the Land Department are as follows:

"*An application for a patent withdraws the lands therein described from subsequent application, until the first*

application is withdrawn or rejected." (June 11, 1880.)
Sickles Mining Dec., p. 105.

"After an application has been made for a patent for a given mining claim, such claim is *virtually withdrawn from market*, pending the final disposition of the case." (Nov. 5, 1874.)
Id. p. 116.

"Where the application for patent was pending under Act of 1866, on the 10th day of May, 1872, *none of the rights which the applicant had acquired by virtue of compliance with said Act of* 1866, *were affected or impaired in any way*, but patents issued upon applications of this class convey the same rights which were conveyed under the Act of 1866, together with all other veins or lodes, the tops or apexes of which lie inside the exterior boundaries of the surface ground patented to the extent and in the manner provided by the third section of the Act of May 10, 1872." (Aug. 17, 1874.) *Id.*, p. 188.

These rulings of the Land Department, and many others not reported, in respect to the issuance of patents applied for under the Act of 1866, ought now to be followed as a RULE OF PROPERTY. If the original construction of the law were doubtful, their unchallenged construction of it, as prospective only, for a period of twenty years, ought not now to be challenged or overthrown.

"In the construction of a doubtful or ambiguous law, the contemporaneous construction of those who were called upon to act under it, *and were appointed to carry its provisions into effect, is entitled to very great weight.*"

Edwards' Lessee vs. *Darby*, 12 Wheat., 210.
Hahn vs. *U. S.*, 107 U. S., 402–406.
U. S. vs. *Johnson*, 124 U. S., 236.

"The construction given to a statute by *those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reason. The officers concerned are usually able men and masters of the subject.* Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

U. S. vs. *Moore*, 95 U. S., 760.
Brown vs. *U. S.*, 113 U. S., 568.
Heath vs. *Wallace*, 138 U. S., 573.

"It is a familiar rule of interpretation, that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *While, therefore, the question is by no means one free from doubt*, we are not inclined *to interfere at this late day with a rule which has been acted upon* by the Court of Claims, and the executive *for so long a time.*"

U. S. vs. *Pugh*, 99 U. S., 265.

See also—

U. S. vs. *Philbrick*, 120 U. S., 52.
U. S. vs. *Hill*, 120 U. S., 169.

"This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, *and in a case of doubt, ought to turn the scale.*"

Brown vs. *U. S.*, 113 U. S., 568.

"This construction of the statute in practice, concurred in by all the departments of the government and continued for so many years, *must be regarded as absolutely conclusive in its effect.*"

U. S. vs. *Hill*, 120 U. S., 169.

"The principle that *the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and* SHOULD ORDINARILY CONTROL THE CONSTRUCTION OF THE STATUTE BY THE COURTS, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. ON THE FAITH OF A CONSTRUCTION THUS ADOPTED, RIGHTS OF PROPERTY GROW UP, WHICH OUGHT NOT TO BE RUTHLESSLY SWEPT ASIDE, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

Pennoyer vs. *McConnaughey*, 140 U. S., 1.

"It is a settled doctrine of this Court that, *in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and,* IF SUCH CONSTRUCTION BE ACTED UPON FOR A NUMBER OF YEARS, WILL LOOK WITH DISFAVOR UPON ANY SUDDEN CHANGE, WHEREBY PARTIES WHO HAVE CONTRACTED WITH THE GOVERNMENT UPON THE FAITH OF SUCH CONSTRUCTION MAY BE PREJUDICED. IT IS ESPECIALLY OBJECTIONABLE THAT A CONSTRUCTION OF A STATUTE FAVORABLE TO THE INDIVIDUAL CITIZEN SHOULD BE CHANGED IN SUCH MANNER AS TO BECOME RETROACTIVE."

U. S. vs. *Alabama Great Southern R. R. Co.*, 142 U. S., 615.

Conclusion.

The plaintiff in error cannot believe that this Court has fully weighed all of the foregoing considerations and authorities, and that it intends deliberately to hold that the express declarations of Congress as to the reservation and protection of all rights acquired under or covered by the mining Act of 1866, are to be disregarded, in the construction of the Act of 1872, and of the revised statutes; that the decisions of the Supreme Court of the United States and other authorities cited, as to the nature of mining property, and against the retrospective construction of statutes, and in favor of a contemporaneous and long continued prospective construction by the officers charged with the execution of the laws, are all to be disregarded in favor of a retrospective construction of the section in controversy

It would seem that, unless the Court can at this late day judicially see that the prospective construction of the Act of 1872, and of the revised statutes, declared by their very terms to be the intention of Congress, and which has been uniformly followed by the Land Department for the past twenty years, is so inherently foolish and unreasonable, that it could not justify the establishment of any rule of property under it, and is not worthy to be dignified with the name of a construction of the statute, the Court ought, by every consideration, to adopt and follow it, and not to overthrow and set it aside. For these

reasons, plaintiff in error respectfully asks for a rehearing of this cause.

H. L. GEAR,
Attorney for Plaintiff in Error.

I hereby certify that the foregoing petition for rehearing is presented in good faith, and not for delay, and in my opinion it is well founded in point of law.

H. L. GEAR,
Attorney for Plaintiff in Error.